

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC95318
)	
)	
AMANDA N. BAZELL,)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF CASS COUNTY, MISSOURI
SEVENTEENTH JUDICIAL CIRCUIT, DIVISION TWO
THE HONORABLE R. MICHAEL WAGNER, JUDGE

APPELLANT'S SUPPLEMENTAL SUBSTITUTE BRIEF

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977, ext. 323
FAX (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	5
STATEMENT OF FACTS.....	5
POINTS RELIED ON	6
ARGUMENT	8
CONCLUSION	19

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<i>Akins v. Director of Revenue</i> , 303 S.W.3d 563 (Mo. banc 2010)	6, 8, 12, 15
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	14, 18
<i>Jones v. United States</i> , 526 U.S. 227 (1999)	14
<i>Kearney Special Rd. Dist. v. County of Clay</i> , 863 S.W.2d 841 (Mo. banc 1993)	12
<i>Spradlin v. City of Fulton</i> , 982 S.W.2d 255 (Mo. banc 1998)	12
<i>State ex rel. Missouri State Bd. of Registration for Healing Arts v.</i> <i>Southworth</i> , 704 S.W.2d 219 (Mo. banc 1986)	6, 16
<i>State v. Acevedo</i> , 339 S.W.3d 612 (Mo. App. S.D. 2011)	16
<i>State v. Chavez</i> , 735 S.W.2d 127 (Mo. App. W.D. 1987)	9
<i>State v. Dixon</i> , 24 S.W.3d 247 (Mo. App. E.D. 2000)	9
<i>State v. Fowler</i> , 938 S.W.2d 894 (Mo. banc 1997)	14
<i>State v. Grim</i> , 854 S.W.2d 403 (Mo. banc 1993)	9
<i>State v. Harris</i> , 156 S.W.3d 817 (Mo. App. 2005)	12
<i>State v. Herret</i> , 965 S.W.2d 363 (Mo. App. E.D. 1998)	9
<i>State v. Littlefield</i> , 594 S.W.2d 939 (Mo. banc 1980)	6, 14
<i>State v. Newhart</i> , 503 S.W.2d 62 (Mo. App., K.C.D. 1973)	13
<i>State v. Passley</i> , 389 S.W.3d 180 (Mo. App. S.D. 2012)	6, 14, 16, 17, 18
<i>State v. Rowe</i> , 63 S.W.3d 647 (Mo. banc 2002)	11, 12, 17

	<u>Page</u>
<i>State v. Ruth</i> 830 S.W.2d 24 (Mo. App. S.D. 1992)	14
<i>State v. Salazar</i> , 236 S.W.3d 644 (Mo. banc 2007).....	16
<i>State v. Severe</i> , 307 S.W.3d 640 (Mo. banc 2010)	16
<i>State v. Sharp</i> , 341 S.W.3d 834 (Mo. App. W.D. 2011)	11
<i>State v. Stewart</i> , 832 S.W.2d 911 (Mo. banc 1992).....	16
<i>State v. Sweeney</i> , 701 S.W.2d 420 (Mo. banc 1985).....	11
<i>State v. Turner</i> , 245 S.W.3d 826 (Mo. banc 2008)	16
<i>Williams v. State</i> , 800 S.W.2d 739 (Mo. banc 1990)	17, 18

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. XIV	6, 8
Mo. Const., Art. I, Sec. 10.....	6, 8

STATUTES:

Section 302.060	7, 12
Section 302.321	7, 17
Section 558.026	7, 17
Section 570.010	7, 14
Section 570.030	5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

Page

RULES:

Rule 27.07.....	7, 9
Rule 29.11.....	7, 9
Rule 30.20.....	7, 9

JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from her original Substitute Brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from her original Substitute Brief with the following additions.

On July 8, 2016, this Court entered the following order: Order Issued: Section 570.030.3, RSMo Supp. 2009, states, "Notwithstanding any other provision of law, any offense in which the value of property or services is an element is a class C felony if [specific facts exist]." (Emphasis added.) Additional briefing is requested on the applicability of this provision, if any, in this case, where the crime of stealing is defined in section 570.030.1, RSMo Supp. 2009, as appropriating "property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." The parties are requested to file supplemental briefs on the issue. Said supplemental briefs are due by noon on July 18, 2016.

POINTS RELIED ON

III.

The trial court erred or plainly erred in entering judgment for the class C felony of stealing on Counts III, IV and VI, and in sentencing Amanda to twelve years imprisonment for those offenses, because this violated Amanda's right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Missouri Constitution, and Section 570.030.3, RSMo (Cum. Supp. 2009), in that neither stealing property or services valued at five hundred dollars or more nor stealing any firearms are class C felonies, since the sentencing enhancement factors contained in Section 570.030.3 only apply to "any offense in which the value of property or services is an element," and value is not an element of stealing; therefore Amanda could only have been convicted of and sentenced for misdemeanor stealing in Counts III, IV and VI.

Akins v. Director of Revenue, 303 S.W.3d 563 (Mo. banc 2010);

State v. Passley, 389 S.W.3d 180 (Mo. App. S.D. 2012);

State v. Littlefield, 594 S.W.2d 939 (Mo. banc 1980);

State ex rel. Missouri State Bd. of Registration for Healing Arts v.

Southworth, 704 S.W.2d 219 (Mo. banc 1986);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

Sections 302.060, 302.321, 558.026, 570.010 and 570.030; and
Rules 27.07, 29.11 and 30.20.

ARGUMENT

III.

The trial court erred or plainly erred in entering judgment for the class C felony of stealing on Counts III, IV and VI, and in sentencing Amanda to twelve years imprisonment for those offenses, because this violated Amanda's right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Missouri Constitution, and Section 570.030.3, RSMo (Cum. Supp. 2009), in that neither stealing property or services valued at five hundred dollars or more nor stealing any firearms are class C felonies, since the sentencing enhancement factors contained in Section 570.030.3 only apply to "any offense in which the value of property or services is an element," and value is not an element of stealing; therefore Amanda could only have been convicted of and sentenced for misdemeanor stealing in Counts III, IV and VI.

Standard of review

Resolution of this issue depends on the interpretation of Sections 570.030.1 and 570.030.3 RSMo (Cum. Supp. 2009). This is a legal question of statutory interpretation that is reviewed *de novo*. *Akins v. Director of Revenue*, 303 S.W.3d 563 (Mo. banc 2010). If this Court believes that this is more properly a question of sufficiency of the evidence, then the issue is preserved by defense counsel's filing of motions for judgment of acquittal during the trial (L.F. 43-46).

Rules 27.07; 29.11(d). Review under those circumstances is in the light most favorable to the verdict. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993).

Furthermore, if this Court finds that because this issue was not presented to the trial court, it must be reviewed for plain error under Rule 30.20, “[th]e sufficiency of the sentence may be reviewed on appeal.” *State v. Chavez*, 735 S.W.2d 127, 132 (Mo. App. W.D. 1987). Amanda was given a twelve-year prison sentence for felony stealing on each of the three challenged counts. Yet, she should only have been sentenced for misdemeanors. That is a manifest injustice. Where a defendant’s sentence has been improperly enhanced, her right to due process has been violated, and the result is a manifest injustice. *State v. Dixon*, 24 S.W.3d 247, 250 (Mo. App. E.D. 2000); *State v. Herret*, 965 S.W.2d 363, 364 (Mo. App. E.D. 1998).

The statute

The crime of stealing is a class A misdemeanor unless otherwise specified in the stealing statute. Section 570.030.8. (“Any violation of this section for which no other penalty is specified in this section is a class A misdemeanor.”). Prior to 2002, Section 570.030.3, RSMo 2000, provided that “Stealing is a class C felony if: ... (1) The value of the property or services appropriated is seven hundred fifty dollars or more; or ... (3) The property appropriated consists of: ... (d) Any firearms” Thus, prior to an amendment to the statute, stealing

property or services valued over seven hundred and fifty dollars or any firearms, along with various other specified items, were class C felonies.

In 2002, the Missouri Legislature in HB 1888 (2002) amended Section 570.030.3 to provide: “Notwithstanding any other provision of law, any offense in which the value of property or services is an element is a class C felony if: ... (1) The value of the property or services appropriated is five hundred dollars or more ...; or ... (3) The property appropriated consists of: ... (d) Any firearms” The current statute reads the same, with some changes that do not affect this analysis.¹ Under the 2002 amendment, the list of items used to enhance an offense to a class C felony applied only when the crime is “any offense in which the value of property or services is an element.” *Id.* Formerly, it applied to “stealing.” Now it does not.² It applies only if value is an element of the offense. In 2009, the version that governs Amanda’s case, the list of items used to enhance an offense to a class C felony applied only when the crime is “any offense in which the value of property or services is an element.”

¹ In the Code that is scheduled to take effect January 1, 2017, the prior language is reinstated, with a change to a class D felony and the restoration of the seven hundred and fifty dollar limit. Section 570.030.5 (RSMo Cum. Supp. 2015).

² This language remains in the current version of the law, current until December 31, 2016. RSMo (Cum. Supp. 2013).

There are other forms of stealing which remain felonies under Section 570.030. In the 2009 version, a person who appropriated materials to manufacture methamphetamine was guilty of a class C felony. Section 570.030.4, RSMo (Cum. Supp. 2009). Since then, a provision has been added to make stealing livestock valued over \$10,000 a class B felony. Section 570.030.4, RSMo (Cum. Supp. 2013). Neither of those provisions define the offense as “any offense in which the value of property or services is an element.” The legislature has drawn a distinction, which it knows how to do.

When the legislature amends an existing statute, any change in the law is generally deemed to have an intended effect, and this Court presumes that any omitted terms were not intended to be included within the scope of the statute. *State v. Sharp*, 341 S.W.3d 834, 844 (Mo. App. W.D. 2011). The legislature will not be charged with having done a meaningless act. *State v. Sweeney*, 701 S.W.2d 420, 423 (Mo. banc 1985). Here the statute was amended by removing “stealing,” and replacing it with “any offense in which the value of property or services is an element.” Section 570.030.3.

Plain language of the statute

“Courts apply certain guidelines to interpretation, sometimes called rules or canons of statutory construction, when the meaning is unclear or there is more than one possible interpretation.” *State v. Rowe*, 63 S.W.3d 647, 649 (Mo. banc

2002). When the words are clear, however, there is nothing to construe beyond applying the plain meaning of the law. *Id.*

“In interpreting a statute, we are to ascertain the intent of the legislature.” *State v. Harris*, 156 S.W.3d 817, 822 (Mo. App. 2005). Such intent, however, can only be derived from the words of the statute itself. *Rowe*, 63 S.W.3d at 650 (citing *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998)).

“Courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning.” *Id.* (citing *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993)). “A court will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result.” *Akins*, 303 S.W.3d at 565.

In *Akins*, this Court examined Section 302.060 to determine the meaning of the word, “conviction.” Despite the appellant’s argument that the plain language of that statute would lead to the absurd result of his having been “convicted more than twice” for multiple counts in one criminal case, this Court held that the plain language of the statute controlled; that there was “nothing absurd or illogical about applying the plain language” of that section. 303 S.W.3d at 566.

Value is not an element of stealing as defined in Section 570.030.1

Stealing is not an “offense in which the value of property or services is an element,” under the plain language of Section 570.030.1. “A person commits the crime of stealing if he or she appropriates property or services of another with the

purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.” Section 570.030.1. This language is in the pre-2002 version of the statute, the 2009 version, and the current version. It is carried over into the new Code as Section 570.030.1(1). That language is identical in all the versions. It does not contain an element of “value.”

The earliest version of this law appears to have been from the 1973 Criminal Code, passed in 1977 in SB 60, and effective January 1, 1979. Section 570.030, RSMo 1978.³ The Comment to 1973 Code instructs: “Because of these problems, the Code provides for a new stealing statute, which more clearly lists the elements of the offense. Under the Code, the following are the essential elements:

1. There must be an appropriation
2. of property or services
3. of another
4. with the purpose to deprive the other thereof
5. accomplished
 - a. without the owner’s consent, or
 - b. by means of deceit, or
 - c. by means of coercion.

³ *State v. Newhart*, 503 S.W.2d 62 (Mo. App., K.C.D. 1973);

These are the only essential elements under the proposed statute, and are defined by statute. See definitions in Section 570.010.”

V.A.M.S. 570.030.

In *State v. Littlefield*, 594 S.W.2d 939 (Mo. banc 1980), this Court determined that stealing was a lesser included offense of robbery, *whether or not the charge of stealing was for less than fifty dollars or more than fifty dollars*. This makes sense only if “over fifty dollars” is *not* an element of the crime itself, but only an enhancer. *But see State v. Fowler*, 938 S.W.2d 894 (Mo. banc 1997), where this Court determined that the name of the victim was not an element of the crime of stealing, but noted in dicta, “[b]ecause appellant was charged with a class C felony, an additional element, that the value of the property appropriated was one hundred fifty dollars or more, had to be alleged and proved.”

In *State v. Ruth* 830 S.W.2d 24, 27 (Mo. App. S.D. 1992), the Southern District Court of Appeals held that the value of the appropriated property is not an element of the offense of stealing. But then in 2012, the Southern District examined the very issue raised here in *State v. Passley*, 389 S.W.3d 180 (Mo. App. S.D. 2012). The *Passley* Court held that *Ruth* was no longer good law under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). 389 S.W.3d at 184. The Court found:

When read in the light of *Apprendi* and *Jones* [v. United States, 526 U.S. 227 (1999)], the clear and plain words used in section 570.030.3 show the legislative intent to treat the property types increasing the punishment

for stealing from a class A misdemeanor to a class C felony as elements of a greater offense where the value of the appropriated property is put in issue. Here, the value of the item alleged to have been stolen, due to its nature and its inherent value as assigned to it by the legislature in listing it among the types of property the theft of which would enhance punishment, was put in issue by the allegation in the information that Defendant was charged with a class C felony for appropriating a credit device. [footnote omitted]

Any other reading of the clear and plain words used in the statute, as suggested by Defendant, leads to the absurd and illogical result that the legislature chose to amend the stealing statute to provide an enhanced punishment for some other offense or offenses but not for the offense mentioned in that very statute and would ignore and render meaningless the language in section 570.030.8 that specifically references other penalties “specified in this section.”

In reaching this conclusion, the Southern District relied on the canon of statutory construction that “[a] court will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result.” *Id.* at 183-84, citing *Akins*, 303 S.W.3d at 565. The Court did not hold that 570.030.8 was ambiguous—instead, the Court determined the defendant’s interpretation would lead to an absurd or illogical result. *Id.* at 184.

But as previously discussed, this canon of construction is inconsistent with the canon of construction that “[w]here the language of a statute is plain and admits of but one meaning, there is no room for construction.” *State ex rel. Missouri State Bd. of Registration for Healing Arts v. Southworth*, 704 S.W.2d 219, 224 (Mo. banc 1986). *See also State v. Acevedo*, 339 S.W.3d 612, 617 (Mo. App. S.D. 2011) (“Where the statutory language is unambiguous, we need not resort to statutory construction and must give effect to the statute as written.”). Because the language of section 570.030.3 is unambiguous, under this canon of construction, the *Passley* Court should have never considered whether the plain language would lead to an absurd or illogical result.

Lenity

Finally, criminal statutes may not be extended by judicial interpretation so as to embrace persons and acts not specifically and unambiguously brought within their terms. *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. banc 2007). Criminal statutes must be construed strictly against the State. *State v. Turner*, 245 S.W.3d 826, 829 (Mo. banc 2008). If there is any ambiguity in a criminal statute, this Court must resort to the rule of lenity and resolve any conflict or ambiguity in Amanda’s favor. *Id.* *See also State v. Stewart*, 832 S.W.2d 911, 914 (Mo. banc 1992) (superseded by statute as stated in *State v. Severe*, 307 S.W.3d 640 (Mo. banc 2010)) (“It is an ancient rule of statutory construction and an oft-repeated one that penal statutes should be strictly construed against the government . . .”).

Therefore, *even if* the *Passley* Court correctly determined that the defendant's argument would lead to an illogical or absurd result, this was an irrelevant conclusion since Section 570.030.1 is unambiguous.

Conclusion: it is the plain language approach which must control this issue

This approach of applying the plain language of the statute is also required by *State v. Rowe*, 63 S.W.3d 647 (Mo. banc 2002). In that case, this Court determined that Section 302.321.1, which declared that it was a felony offense for a person to drive while his license was canceled or suspended or revoked "under the laws of this state," did not apply to a man who had had his driver's license indefinitely suspended in Iowa. *Id.* at 648-649. This Court reversed the defendant's felony conviction, noting that the phrase "under the laws of this state" required that result even though it seemed "unlikely that the Missouri Legislature intended to allow out-of-state drivers with multiple offenses suffer only the consequences of a misdemeanor for driving after revocation while subjecting Missouri drivers to a felony for the same act." *Id.* at 649-50.

Similarly, in *Williams v. State*, 800 S.W.2d 739, 740 (Mo. banc 1990), this Court determined that while Section 558.026.1 was clear that certain sex offenses must run consecutively to other offenses, it did not "say in explicit language what must be done if there are multiple convictions of those [sex] offenses listed." This Court resolved any ambiguity "in favor of according the trial court maximum discretion." *Id.* The State argued "that such a construction is illogical, and that

the legislature obviously did not intend such an illogical result.” *Id.* This Court, though, rejected this analysis, stating that “[i]t is not for us to say whether the statute is logical or not.” *Id.*

Finally, the Southern District’s determination in *Passley* that the “any firearms” language must be an element because the United States Supreme Court held in *Apprendi* that any fact increasing the penalty of a crime must be proved beyond a reasonable doubt constitutes circular reasoning. If the offense of stealing as defined in 570.030.1 does not contain value as an element, then nothing in 570.030.3 suggests that 570.030.3 itself can be used to provide an element lacking in 570.030.1.

Request for relief

The stealing statute provides that, although an offense can be elevated to a class C felony if the property is “any firearms” or property or services with a value over five hundred dollars, such an offense must be one in which the value of the property is an element, Section 570.030.3. And since value is not an element of stealing, Section 570.030.3 does not apply, and these thefts are no longer class C felonies. Therefore, Section 570.030.8, RSMo (Cum. Supp. 2009) applies: “[a]ny violation of this section for which no other penalty is specified in this section is a class A misdemeanor.” In the alternative to the relief requested in Point I of her brief, Amanda is entitled to be resentenced to class A misdemeanors for Counts III, IV and VI.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse either Count III or IV outright, and reverse and remand the other counts for a new and fair trial. In the alternative, appellant respectfully requests that this Court reverse Counts III, IV and VI and remand for entry of judgment and resentencing for misdemeanor stealing, and reverse and remand the other counts for a new and fair trial.

Respectfully submitted,

/s/ Ellen H. Flottman

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone: (573) 777-9977, ext. 323
FAX: (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, the brief contains 3,554 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 18th day of July, 2016, an electronic copy of Appellant's Supplemental Substitute Brief was placed for delivery through the Missouri e-Filing System to Richard Starnes, Assistant Attorney General, at Richard.Starnes@ago.mo.gov.

/s/ Ellen H. Flottman

Ellen H. Flottman